No. 84-262

In The

Supreme Court of the United States

October Term, 1984

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,

Petitioner,

vs.

PUEBLO OF SANTA ANA,

Respondent.

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

KATHRYN MARIE KRAUSE, ESQ.
(Counsel of Record)
MARY C. SNOW, ESQ.
931 14th Street, Room 1300
Denver, Colorado 80202
(303) 624-2200

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Petitioner, The Mountain States Telephone and Telegraph Company ("Mountain Bell"), respectfully submits this Reply Brief pursuant to Rule 22.5 of the Rules of the Supreme Court of the United States in order to address arguments first raised in the Respondent Pueblo of Santa Ana's Brief in Opposition to Petition for Writ of Certiorari ("Pueblo Br."). Specifically, Mountain Bell will address the Pueblo's erroneous contention that the right-of-way involved here is valid only if Section 17 contains affirmative language granting to the Secretary authority to approve the grant. Secondly, the new evidence attached as Appendices 1 and 2 to the Pueblo's Brief support the construction of Section 17 contemporaneously adopted by the Agency charged with administering Pueblo lands under the Pueblo Lands Act and ignored by the Tenth Circuit. For these reasons, a Writ of Certiorari should issue to review the decision of the Tenth Circuit Court of Appeals.[1]

I. The Pueblo's Assertion That Congress Must Employ Affirmative Language When Authorizing the Secretary to Approve Pueblo Conveyances is Erroneous and Highlights the Conflict Between This Court's Interpretation of the Non-Intercourse Act and the Lower Court's Opinion.

The Pueblo asserts that Section 17 does not support the validity of the Pueblo's conveyance, because Section 17 "is entirely phrased in the negative[.]" (Pueblo Br.

---

[1] The Pueblo's contention that this Petition raises an "inconsequential question" regarding an "obsolete statute" (Pueblo Br. at 5, 1) is belied by the Pueblos of New Mexico having filed at least sixteen lawsuits against individuals, corporations and United States agencies concerning issues related to the Pueblo Lands Act. *See* Petition, Appendix F, 40-42.

at 17.) The Pueblo cites to no case which supports the proposition that Congress should have used "granting" language in a statute *recognizing* the sovereign power of alienation in an Indian tribe and restricting its exercise. *Mitchel v. United States,* 9 Pet. 711, 736-760 (1835); *Jones v. Meeham,* 175 U.S. 1, 9 (1899). In restricting a recognized power to act, one not granted by Congress but existing as a sovereign attribute, language of restriction is expected.

> Perhaps the most basic principle of all Indian law, supported by a host of decisions . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty.
>
> • • •
>
> From the earliest years of the Republic the Indian tribes have been recognized as "distinct, independent, political communities," [Worcester v. Georgia, 6 Pet. 515, 559 (1832)] and, as such, qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignty. Thus treaties and statutes of Congress have been looked to by the courts as limitations upon original tribal powers, or, at most, evidences of recnition of such powers, rather than as the direct source of tribal powers.

F. Cohen, *Handbook of Federal Indian Law,* p. 122, fn. 4 omitted, (1942 ed., Univ. of N.M. Press Reprint). *See also, United States v. Oneida Nation of New York,* 477 F.2d 939, 942 (Ct. Cl. 1973).

In drafting Section 17, Congress employed a statutory model consonant both with the recognition of tribal sovereignty and with Congressional restriction. It chose a model with which it was already familiar—the Non-Intercourse Act.[2] The Non-Intercourse Act did not contain granting language to Indian tribes authorizing or empowering them to convey property. They already had that power. Congress merely restricted it. In the Pueblo Lands Act, Congress conditioned the tribal exercise of its con-

---

[2] The second clause of Section 17 was obviously modeled after one of the earlier Non-Intercourse Acts (rather than the 1834 iteration) because it contains the phrase, "or any Pueblo Indian living in a community of Pueblo Indians." This would have paralleled the clause, "made by any Indians" or "from any Indian" which was found in the Non-Intercourse Acts of July 22, 1790, Section 4, 1 Stat. 137; Act of March 1, 1793, Section 8, 1 Stat. 329; Act of May 19, 1796, Section 12, 1 Stat. 469; Act of March 3, 1799, Section 12, 1 Stat. 743; Act of March 30, 1802, Section 12, 2 Stat. 139, but which is not found in the 1834 Act apparently because the system of allotments was taking shape by which individual Indians (of some tribes) would eventually have the power to convey. F. Cohen, *Handbook of Federal Indian Law, supra,* p. 326. Secretarial approval would obviously not validate a conveyance that was infirm on some substantive legal ground. *Barnett v. Equity Trust Co.,* 21 F.2d 325, 326, 332 (2d Cir. 1927), *app. dismissed, sub nom American Baptist Home Mission Soc. v. Barnett,* 26 F.2d 350 (2d Cir. 1928). A right-of-way grant from an individual Pueblo Indian would be invalid and thus the "absurd conclusion" feared by the Pueblo in this case (Pueblo Br. at 18-19, n. 8) would not result.

veyance power upon Secretarial approval. To ignore such a clear statutory parallel would be erroneous. The principles of liberal construction argued for by the Indians do not permit a court to ignore the clear wording of a treaty, agreement or enactment or to disregard the intent of Congress. *Rice v. Rehner,* 103 S.Ct. 3291, 3302 (1983). Courts are not empowered to remake history or expand treaties or legislation beyond their clear terms. *United States v. Minnesota,* 466 F.Supp. 1382, 1385 (D. Minn. 1979), *aff'd sub nom Red Lake Band of Chippewa Indians v. Minnesota,* 614 F.2d 1161 (8th Cir.), *cert. denied* 449 U.S. 905 (1980).

The language employed by Congress in this case recognized the power of the Pueblo to convey lands, but restricted that right and conditioned it upon Secretarial approval. This was in accord with the practice in existence at the time the Pueblo Lands Act was passed (Petition at 16) and comported "with the conditions of the Pueblo Indians" (Pueblo Br. at App. 2, 12).[3]

---

[3] The Department of the Interior did not employ this procedure with the Pueblos exclusively but viewed it as a means of securing rights-of-way across lands of any tribe. In introducing legislation that became the 1948 General Purpose Rights-of-Way Act, 25 U.S.C. §§ 323-328 (1982), Under Secretary of the Interior, Oscar L. Chapman, wrote to Arthur H. Vandenberg, President *pro tempore* of the Senate.

> When it is discovered that an application for a right-of-way may not be granted under existing statutory authority, which is often the case, the right must then be obtained by means of easement-deeds executed by the Indian owners and approved by the Secretary of the Interior.

S. Rep. No. 823, 80th Cong., 2d Sess. 3-4 (1948), *reprinted in* 1948 U.S. Code Cong. & Ad. News 1033, 1036. Thus, the administrative practice was comparable to that applicable to other tribes.

II. Appendices 1 and 2 of the Brief in Opposition Support the Agency Construction of the Act and Contradict the Tenth Circuit Holding.

The Pueblo has attached as Appendices 1 and 2 to its Brief two letters which were not included in the record before the lower courts. The Pueblo claims that these letters support its position that the right-of-way involved in this lawsuit is invalid. Assuming for purposes of this Reply Brief that the Court will consider such documents, Mountain Bell believes that the documents attached to the Pueblo's Brief are not helpful to the Pueblo's arguments and, in fact, support Mountain Bell's position.

The first document attached is a letter from George A. H. Fraser, Special Assistant to the Attorney General, who represented the United States in some Pueblo Lands Act cases. The Pueblo interprets this letter as evidence that Mr. Fraser adopted the interpretation urged by Mountain Bell only to avoid financial difficulty and public embarrassment for various railroads and utilities. (Pueblo Br. at 9.)

The Pueblo maintains, without citation, that the construction of Section 17 adopted by the Department of the Interior "originated with Chicago bond lawyer, Melvin Hawley," (Pueblo Br. at 9). In fact, the document attached as Appendix 1 (Pueblo Br. at App. 1, 1-11), reveals that representatives of the Department of the Interior, the Pueblos, and those seeking rights-of-way across Pueblo lands agreed that Section 17 "presents one of the numerous puzzles offered by the Act [,]"[4] and concluded

---

[4] This, of course, controverts the Tenth Circuit's Decision that the language of Section 17, being joined by a conjunctive,

(Continued on following page)

that the construction of the second half of Section 17 allowing voluntary conveyances with Secretarial approval was "reasonable."

The letter attached by the Pueblo was written by Mr. Fraser to the Attorney General in February of 1926. Later that year, the Pueblo of Santa Ana and the Pueblo of Zia granted to the railroad a right-of-way under Section 17, but the Pueblo of Jemez refused. Because the Jemez Pueblo had "persistently refused to make a contract," it was determined that there was no adequate remedy to secure for the railroad a right-of-way short of a bill authorizing condemnation proceedings. Act of May 10, 1926, 44 Stat. 498. H. Rep. No. 955, 69th Cong., 1st Sess. (1926). *See also,* H. Rep. No. 94-800, 94th Cong., 2d Sess. (1976) and S. Rep. No. 94-148, 94th Cong., 1st Sess. (1975).

Mr. Fraser did not consider condemnation as a permanent cure for the Pueblo right-of-way problem. Rather, he advocated that the existing right-of-way statutes be made applicable to the Pueblos. H. Rep. No. 955, 69th Cong., 1st Sess. (1926). Such act was not taken by Congress until April 21, 1928, 45 Stat. 442, 25 U.S.C. § 322. Prior to that Congressional enactment, on January 4, 1927, Mr. Fraser wrote to Mountain Bell attorneys and inquired into their intentions regarding a right-of-way across the Pueblo of Taos (App. 1-2). In that letter, he makes reference to the 1926 condemnation legislation and concludes by stating "The Pueblo Lands Act of June 7, 1924 . . . also provides in section 17 a method whereby

---

(Continued from previous page)

meant "exactly what it says [,]" (Petition at App. A, 8) and was not ambiguous. However, even if the language was unambiguous, the Tenth Circuit erred in failing to defer to the undisputed construction placed upon that Section by the Agency charged with its administration. *Chemehuevi Tribe of Indians v. F.P.C.,* 420 U.S. 395, 403-404, 409-410 (1975).

titles may be procured from the Pueblo Indians with the assent of the Secretary of the Interior. In my judgment, these are the only two ways whereby a good title can now be obtained." (App. 2).

Thus, by 1927, if Mr. Fraser had had any doubts regarding the use of Section 17 as authority for rights-of-way across Pueblo lands when approved by the Secretary of the Interior, they had undisputedly disappeared. Mr. Fraser was affirmatively communicating his reasonable interpretation to utilities as being one of "only two ways a good title" could be obtained. Certainly, a right-of-way negotiated with the Pueblos was more beneficial to them than condemnation.

The fact that, after the passage of the 1928 Act, Section 17 was used only occasionally does not refute that the administrative practice under it was obviously thought out, was contemporaneous, was concurred in by the Pueblos through their counsel, was endorsed by numerous parties, and was communicated to the Attorney General and to third parties. The fact that it was used only occasionally after 1928 does not dispute, as the Pueblo attempts to do (Pueblo Br. at 21-22), the established construction given it by the Agency when it was in use.

After 1928, the Pueblo Indians were treated basically the same as other Indian Tribes for purposes of right-of-way grants. As Mr. Fraser's letter to the Attorney General makes clear, one of the reasons for using Section 17 was so that the Pueblo Indians would not be in a favored position over other Indians and would not be able to prevent utilities from crossing their grants. (Pueblo Br. at App. 1, 4-5.) The construction adopted by the Agency permitted such beneficial uses and without it no

utility could have gotten a right-of-way grant across Pueblo lands between 1924 and 1926; and between 1926 and 1928, rights-of-way could have only been secured by condemnation.

The Pueblo's professed dilemma (Pueblo Br. at 16-17) as to the effect of the Act of April 21, 1928 on Section 17 is resolved by the Administrative practice occurring at the time of the 1928 Act. The 1926 condemnation legislation was passed because the Jamez Pueblo would not contract for a right-of-way. The 1928 Act was passed because the 1926 condemnation Act was found to be unconstitutional. Congress acted to apply previously existing right-of-way statutes across Indian lands to the Pueblo in a historical context where the Pueblos would not consent to the grants of right-of-way.[5] Therefore, while the 1928 Act, and the regulations promulgated thereunder, addressed problems inherent in a Pueblo withholding its consent, Section 17 of the Pueblo Lands Act provided an alternative method of acquiring a right-of-way if Pueblo consent was obtainable.

The second letter attached as Appendix 2 (Pueblo Br. at App. 12-14) is also not helpful to the Pueblo's case. That letter was written by Francis Wilson, who the Pueblo claims drafted Section 17, and states that Section 17 "is intended to cover the same ground as Section 2116 of the Revised Statutes but *it is changed so as to accord with*

---

[5] Regulations adopted by the Department of the Interior in 1929 specifically provided that "the approval of the Secretary of Interior [to right of way applications], may be given in his discretion, even though no amicable settlement has been reached with the Indians." 1929 Regulations of the Department of the Interior Concerning Rights of Way Over Indian Lands, ¶ 79.

the conditions of the Pueblo Indians." (Pueblo Br. at App. 12.) The emphasized language supports the interpretation that the Pueblo, historically possessing authority to grant property interests with governmental approval, *United States v. Candelaria*, 271 U.S. 432 (1926), would be allowed to exercise that authority under the supervision of the Secretary of Interior.

The Brief in Opposition, even with its attached Appendices, has failed to refute that the administrative practice of the Interior Department under Section 17 was a reasonable one and that the Pueblos had the authority under that section to grant rights-of-way with Secretarial approval.

III. CONCLUSION

For the foregoing reasons, Mountain Bell prays that a Writ of Certiorari be issued to review the judgment of the opinion of the United States Court of Appeals for the 10th Circuit.

Respectfully submitted this 26 day of September, 1984.

KATHRYN MARIE KRAUSE, ESQ.
(Counsel of Record)
MARY C. SNOW, ESQ.
931 14th Street, Room 1300
Denver, Colorado 80202
(303) 624-2200

Attorneys for Petitioner

APPENDIX

DEPARTMENT OF JUSTICE

Santa Fe, N.M., Jan. 4, 1927.
c/o Pueblo Lands Board.

Messrs. Smith & Brock, Att'ys,
for the Mountain States Tel. & Tel. Co.,
Denver, Colorado

In re: Telephone lines on the
Pueblo of Taos,
Taos County, New Mexico.

Dear Sirs:

In my capacity as attorney for the United States with instructions to bring suit to quiet title to effectuate the decisions of the Pueblo Lands Board on Pueblo titles in New Mexico, I write to inquire the facts with regard to your two telephone lines crossing the Pueblo of Taos. My information, which is very meagre, is to the effect that your main line now enters the Pueblo grant from the south, and after proceeding northerly for some distance, thence progresses in an easterly and westerly direction across the main grant and also across the Tenorio tract, which also belongs to the Pueblo. Further, I understand that you own, or operate, an earlier line, originally constructed by, or for, Dr. Thomas Martin, of Taos, the exact location of which I do not know.

The Board probably sometime during the present month will file its report on this Pueblo determining which titles of settlers or other intruders on the grant are valid and which invalid. Among these titles will be yours to these two telephone lines. I have heard that you took some steps to legitimate your title to the new main line, but cannot learn here exactly what you did. A some-

what similar situation arose on the Pueblo of Jemez with regard to a railway there which supposed that it had acquired a satisfactory title under the Act of March 2, 1899, 30 Stat. 990, as amended, 36 Stat. 859, U.S. Compiled Statutes, Sec. 4181, et seq. I made up my mind that no title could be obtained to any portion of the Pueblo Indian grants under these statutes, and was therefore forced to bring suit to quiet title against this railway. One result of this was that in 1926 a statute was passed permitting the condemnation of Pueblo Indian lands in New Mexico. The Pueblo Lands Act of June 7, 1924, 43 Stat. 331, also provides in section 17 a method whereby titles may be procured from the Pueblo Indians with the assent of the Secretary of the Interior. In my judgment these are the only two ways whereby a good title can now be obtained.

I have, of course, no hostile feeling towards your Company, but it is necessary that this question of title shall be cleared up, and with that end in view I would be greatly obliged if you would let me know exactly what the present status of your right is to the two lines above mentioned and any other telephone line, if such there is, on the Taos Pueblo grant.

Please address me "c/o Pueblo Lands Board, Santa Fe, New Mexico."

With kindest personal regards, I am,

Very sincerely yours,

/s/ George A. H. Fraser

Special Assistant to
the Attorney General

GAHF-S